

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOE N. AND BLANCHE DAVINGER	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975.	:	

Petitioners, Joe N. and Blanche Davinger, 241 Central Park West, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1975 (File No. 804258).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 21, 1988 at 9:45 A.M., with petitioners' brief to be submitted by September 21, 1988. Petitioners appeared by Hilton M. Soba, Esq. The Audit Division appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether petitioners timely filed a New York State personal income tax return for 1975.
- II. Whether petitioners made withholding tax payments and estimated tax payments for 1975 in excess of the amounts allowed by the Audit Division.

FINDINGS OF FACT

1. Petitioners, Joe N. and Blanche Davinger, filed an undated United States Income Tax Return for 1975 which was stamped "Received" by the Internal Revenue Service on September 7, 1976. Although the address shown on the return was in care of petitioner's former accountant, the return indicated that petitioners lived in the City, County and State of New York.
2. The Federal return showed that petitioners paid \$4,434.00 in withholding tax, \$6,000.00 in estimated tax and \$2,500.00 with Form 4868 (Extension of Time to File a Return), for a total of \$12,934.00. The tax shown due on the return was \$11,437.00, and petitioners requested a refund of \$1,497.00.
3. Upon audit, the Internal Revenue Service disallowed \$8,194.00 in entertainment and promotion expense and \$11,817.00 in travel expense, as well as \$413.00 in medical and dental deductions. A Federal Statement of Audit Changes dated June 27, 1978 and modified July 18, 1978 shows a deficiency in tax of \$10,270.00 and a penalty under Internal Revenue Code § 6651(a) of \$1,541.00.

4. Petitioners' former accountant, who held their power of attorney, did not respond to Internal Revenue Service inquiries and, as a result, the Service assessed \$10,270.00 in tax and \$1,958.96 in penalty and interest on February 19, 1979. The assessment was satisfied by the Service's application of tax payments and overpayments for other years against the deficiency for 1975.

5. Petitioners discharged their former accountant in or about 1979 and their present accountant subsequently filed a claim for credit or refund for the \$12,228.96 in taxes, penalty and interest paid. The date of the claim is not in the record. Petitioners were able to document the deductions taken on the 1975 return and it was accepted as filed. A refund of \$11,811.00 was authorized by the Internal Revenue Service in a letter dated July 19, 1982 and on October 29, 1982, a check was issued to petitioners for \$19,778.69.

6. On March 18, 1982, a notice was sent to petitioners in care of their former accountant (the address shown on the Federal return) by the Audit Division stating that the Internal Revenue Service had reported Federal audit changes to New York State and that the information received indicated that petitioners were required to file a New York State income tax return. The notice also stated that the Audit Division was unable to locate petitioners' New York return. This letter appears to have been returned as "Moved - Not Forwardable". The letter was then remailed to petitioners at 241 Central Park West, New York, New York 10024 on April 13, 1982. Petitioners' present accountant admits that the first letter from the State was received during the time that the Federal claim for refund was being processed, but questioned whether the letter of March 18, 1982 was such letter. Petitioners' present accountant testified that, as he recalled, the letter, which had been given to him by Mr. Davinger, inquired about the Federal disallowances. The accountant testified further that he replied to the Audit Division stating that petitioners were contesting the Federal disallowances and making a claim for refund and that he would report the results of the claim to the State. The accountant, however, could produce neither the letter he received, nor a copy of his response.

7. On December 11, 1985, the Audit Division issued a Statement of Audit Changes to petitioners at 241 Central Park West, New York, New York 10024, adjusting petitioners' income based on the original Federal audit changes, plus penalties for late filing and late payment. Total tax claimed was \$10,197.67, with total penalties under Tax Law § 685(a)(1) and (2) of \$4,843.90, plus interest.

8. On July 9, 1986, based on information submitted with respect to the Federal redetermination, the Audit Division reduced the tax claimed to be due to \$7,057.48 and adjusted the penalties accordingly.

9. On September 23, 1986, the Audit Division issued to petitioners a Notice of Deficiency for the year 1975 asserting \$7,057.48 in additional tax due, \$3,352.30 in penalty and \$9,068.24 in interest, for a total due of \$19,478.02.

10. On October 14, 1986, based on additional documentation of the withholding of \$483.49 in New York State personal income tax by Mrs. Davinger's employer, tax due was further reduced to \$6,573.99. Penalty was reduced to \$3,122.65 and interest was recalculated at \$8,447.00, for a total due of \$18,143.64.

11. In a search made on or about May 24, 1988, the Department of Taxation and Finance found that it had no record of receiving a New York State personal income tax return from petitioners for the year 1975.

12. By letter dated April 6, 1987, in response to petitioners' request for copies of cancelled checks, Manufacturer's Hanover Trust Company stated that records of all checks for the period April 15, 1975 through December 1976 had been destroyed and copies of such checks could no longer be obtained.

SUMMARY OF PETITIONERS' POSITION

13. Petitioners claim that a New York State income tax return was filed by them for 1975 and also that petitioner Joe N. Davinger should be given credit for taxes withheld on \$15,926.00 in income paid by an employer, Classy Leather Goods, Inc., and quarterly estimated tax payments paid on \$38,865.00 in self-employment income.

14. Petitioners offered no documentary evidence, such as copies of a tax return, withholding tax forms, cancelled checks, etc. Mr. Davinger's testimony that he saw his former accountant mail the 1975 return is not credible. It is noted that the affidavit of the former accountant, which was offered at the hearing by petitioners, states that his practice was to "put the items into stamped envelopes for mailing by Mr. Davinger when he got down stairs in my building."

15. At the hearing petitioners were given until September 21, 1988 to submit additional documentation which petitioners' representative stated he intended to obtain pursuant to a Freedom of Information Act request and, possibly, through a bank subpoena. However, nothing was submitted after the hearing.

CONCLUSIONS OF LAW

A. That Tax Law § 683(c)(1)(A) provides that New York State personal income tax may be assessed at any time if no return is filed.

B. That petitioners have not sustained their burden of proof under Tax Law § 689(e) to show that a 1975 New York State income tax return was ever filed, or to show that withholding tax or estimated tax payments were made in excess of the amounts allowed by the Audit Division. The Department of Taxation and Finance files showed no record of having received such return. This was the case both in 1982, after the initial Federal changes were received, and in May 1988, in a search made prior to the hearing.

Petitioners could not produce a copy of the 1975 return or copies of cancelled checks, withholding tax forms or other documentary evidence pertaining to tax payments on behalf of Joe N. Davinger for 1975.¹ Petitioners were made aware of the State's claim in 1982 and should have

¹At the hearing, petitioners' accountant claimed that he and most accountants with whom he speaks advise their clients to keep records for three years from the time tax returns are filed, as there is a three-year statute of limitations. Three years would seem to be too brief a retention period, however, in view of the six-year statute of limitations established by Tax Law § 683(d) in cases where an omission of income exceeds 25 percent of adjusted gross income, and the absence of a statute

attempted to reconstruct estimated tax payments or withholding tax payments at that time.

C. That the petition of Joe N. and Blanche Davinger is denied and the Notice of Deficiency issued September 23, 1986, as reduced by the modifications made on October 14, 1986 (Finding of Fact "10"), is sustained.

DATED: Albany, New York
December 22, 1988

/s/ Robert F.
Mulligan _____
ADMINISTRATIVE LAW JUDGE

of limitations in cases where no return is filed (Tax Law § 683[c][1][A]), or where a false or fraudulent return is filed (Tax Law § 683[c][1][B]). It is noted that the Internal Revenue Code has similar provisions (see, Internal Revenue Code § 6501[c],[e]).